

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

MAXIMINO BUENAVENTURA, *et al.*,

Plaintiffs,

v.

CHAMPION DRYWALL, INC. OF  
NEVADA, *et al.*,

Defendants.

Case No. 2:10-cv-00377-LDG (RJJ)

**ORDER**

The plaintiffs--Maximino Buenaventura, Alejandro Dominguez Lopez, Marcelo Hernandez and Eloy Pumarino--were or are employed by defendant Champion Drywall, Inc. of Nevada. The plaintiffs allege that they worked more than forty hours per week but were not paid overtime compensation. In addition to bringing a Fair Labor Standards Act claim against Champion Drywall, the plaintiffs also allege this claim against four of Champion Drywall's officers and directors. The plaintiffs also allege state law claims against Champion Drywall. Champion Drywall and the individual defendants now move to dismiss (#32) the complaint. The plaintiffs oppose the motion (#43).

1 Motion to Dismiss

2 The defendants' motion to dismiss, brought pursuant to Fed. R. Civ. P. 12(b)(6),  
 3 challenges whether the plaintiffs' complaint states "a claim upon which relief can be  
 4 granted." In ruling upon this motion, the court is governed by the relaxed requirement of  
 5 Rule 8(a)(2) that the complaint need contain only "a short and plain statement of the claim  
 6 showing that the pleader is entitled to relief." As summarized by the Supreme Court, a  
 7 plaintiff must allege sufficient factual matter, accepted as true, "to state a claim to relief that  
 8 is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).  
 9 Nevertheless, while a complaint "does not need detailed factual allegations, a plaintiff's  
 10 obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels  
 11 and conclusions, and a formulaic recitation of the elements of a cause of action will not do."  
 12 *Id.*, at 555 (citations omitted). In deciding whether the factual allegations state a claim, the  
 13 court accepts those allegations as true, as "Rule 12(b)(6) does not countenance . . .  
 14 dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v.*  
 15 *Williams*, 490 U.S. 319, 327 (1989). Further, the court "construe[s] the pleadings in the  
 16 light most favorable to the nonmoving party." *Outdoor Media Group, Inc. v. City of*  
 17 *Beaumont*, 506 F.3d 895, 900 (9<sup>th</sup> Cir. 2007).

18 However, bare, conclusory allegations, including legal allegations couched as  
 19 factual, are not entitled to be assumed to be true. *Twombly*, 550 U.S. at 555. "[T]he tenet  
 20 that a court must accept as true all of the allegations contained in a complaint is  
 21 inapplicable to legal conclusions." *Ashcroft v. Iqbal* 556 U.S. \_\_\_, 129 S.Ct. 1937, 1949  
 22 (2009). "While legal conclusions can provide the framework of a complaint, they must be  
 23 supported by factual allegations." *Id.*, at 1950. Thus, this court considers the conclusory  
 24 statements in a complaint pursuant to their factual context.

25 To be plausible on its face, a claim must be more than merely possible or  
 26 conceivable. "[W]here the well-pleaded facts do not permit the court to infer more than the

1 mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the  
2 pleader is entitled to relief.’ *Id.*, (citing Fed. R. Civ. Proc. 8(a)(2)). Rather, the factual  
3 allegations must push the claim “across the line from conceivable to plausible.” *Twombly*.  
4 550 U.S. at 570. Thus, allegations that are consistent with a claim, but that are more likely  
5 explained by lawful behavior, do not plausibly establish a claim. *Id.*, at 567.

#### 6 FLSA Claim Against Individual Defendants

7 The individual defendants—Paul DiGuseppi, Denise DiGuseppi, Ron Ruby, and Ed  
8 Golchuk—argue that the plaintiffs failed to allege sufficient facts to state an FLSA claim  
9 against them as employers. The Court agrees.

10 An FLSA claim may only be brought against an “employer.” The FLSA defines  
11 “employer” broadly to include “any person acting directly or indirectly in the interest of an  
12 employer in relation to an employee.” 29 U.S.C. §203(d). The Ninth Circuit has directed  
13 that this definition should “be given an expansive interpretation in order to effectuate the  
14 FLSA’s broad remedial purposes.” *Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9<sup>th</sup> Cir.  
15 1999). An individual is an employer within the meaning of the FLSA if he or she “exercises  
16 ‘control over the nature and structure of the employment relationship,’ or ‘economic control  
17 over the relationship.’” *Id.*, at 1012. “The determination of whether an employer-employee  
18 relationship exists does not depend on isolated factors but rather upon the circumstances  
19 of the whole activity. The touchstone is the economic reality of the relationship.” *Boucher*  
20 *v. Shaw*, 572 F.3d 1087, 1091 (9<sup>th</sup> Cir. 2009) (internal quotations and citations omitted).  
21 While an officer or director of a corporation may be an employer, merely being an officer or  
22 director does not establish that the individual exercised either the control over the nature  
23 and structure of the employment relationship or the economic control over the relationship  
24 requisite to liability as an employer. See, eg., *Solis v. Velocity Express, Inc.*, 2010 WL  
25 2990293 (D. Or. 2010).

1 In opposing the motion, the plaintiffs direct the court to only two allegations against  
2 the individual defendants: that they are officers and directors of Champion Drywall, and a  
3 generalized allegation that the individual defendants engaged in the alleged acts or  
4 omissions *either* directly or through supervisory agents. These allegations are insufficient.  
5 While it is possible that the individual defendants, as officers and directors of a corporation,  
6 exercised the requisite economic control or control of the nature and structure of the  
7 employment relationship, such allegations are also consistent with a determination that the  
8 individual defendants were not employers. Though the plaintiffs need not make detailed  
9 factual allegations, they must allege some facts from which this Court could find plausible  
10 that these defendants exercised the requisite control that would expose them to liability  
11 under the FLSA as an employer. Accordingly, the Court will dismiss the FLSA claim  
12 against the individual defendants without prejudice.

#### 13 FLSA Claim Against Champion Drywall

14 The plaintiffs have alleged sufficient facts to proceed with their FLSA claim against  
15 Champion Drywall. The plaintiffs do not need to make detailed factual allegations, and  
16 they have sufficiently alleged that they worked in excess of 40 hours per week but were not  
17 paid overtime compensation. The Court will deny defendant's motion to dismiss the FLSA  
18 claim.

#### 19 State Statutory Claims

20 The defendant argues that a private right of action does not exist under §§ 608.018  
21 and 608.040(1). The Court disagrees.

22 In *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 194 P.3d 96 (2008), the  
23 Nevada Supreme Court concluded that the plaintiffs did not have a private cause of action  
24 to enforce §§ 608.100, 608.120, and 608.160. In so doing, the Nevada Supreme Court  
25 contrasted these statutes with §§ 608.140 and 608.150. While §§ 608.140 and 608.150  
26 were "otherwise enforceable by the Labor Commissioner," each "expressly recognize[d] a

1 civil enforcement action to recoup unpaid wages.” *Id.*, at 105, fn.3. Section 608.140  
2 states:

3           Whenever a mechanic, artisan, miner, laborer, servant or employee  
4 shall have cause to bring suit for wages earned and due according to the  
5 terms of his or her employment, and shall establish by decision of the court or  
6 verdict of the jury that the amount for which he or she has brought suit is  
7 justly due, and that a demand has been made, in writing, at least 5 days  
before suit was brought, for a sum not to exceed the amount so found due,  
the court before which the case shall be tried shall allow to the plaintiff a  
reasonable attorney fee, in addition to the amount found due for wages and  
penalties, to be taxed as costs of suit.

8 As this Court has previously noted, §608.140 “specifically creates a cause of action for  
9 wages earned and unpaid and penalties and a reasonable attorney’s fee.” *Nunez v.*  
10 *Sahara Nevada Corp.*, 677 F.Supp. 1471, 1475 n.7 (D.Nev. 1988).

11           Section 608.018 imposes a duty on employers to pay 1 1/2 times an employee’s  
12 regular wage rate whenever an employee works more than 40 hours in any scheduled  
13 week of work. While the provisions of §608.018 do not apply to numerous categories of  
14 employees (and thus cannot be enforced by either private action or by the Labor  
15 Commissioner on behalf of these excluded employees), nothing in the language of  
16 §608.018 suggests that the overtime compensation that an employer must pay to covered  
17 employees is other than a wage. Accordingly, as employees can maintain a private cause  
18 of action for unpaid wages pursuant to §608.140, employees covered by §608.018 can  
19 bring a private cause of action for the unpaid overtime wages owed pursuant to §608.018.

20           Employees may also bring a private cause of action to enforce §608.040. Section  
21 608.140 recognizes that under appropriate circumstances a plaintiff can recover attorney’s  
22 fees “in addition to the amount found due for wages and penalties.” Accordingly, as an  
23 employee can recover amounts owed for wages earned and due and for penalties under  
24 §608.140, and as §608.040 imposes a penalty for failure to timely pay wages, an employee  
25 can enforce §608.040 by private action.

1 The defendant urges this Court to follow an unpublished decision of this Court,  
 2 *Lucas v. Bell Trans*, 2008 WL 242557 (D.Nev. 2009) and an unpublished decision of a  
 3 Nevada trial court in *Csomos v. Venetian Casino Resort*, No. A5811356. Initially, the Court  
 4 would note that the defendant has failed to attach a copy of either unpublished decision to  
 5 its motion. While the Court has access to the prior unpublished decision of this Court, the  
 6 defendant's failure to attach a copy of the *Csomos* decision precludes this Court from  
 7 giving any consideration to that decision.

8 Nevertheless, the Court finds that defendant's reliance on *Lucas* is misplaced.  
 9 Without dispute, the court stated, in *Lucas*, that "[t]he private right of action for unpaid  
 10 wages, however, does not extend to minimum wage and overtime claims.<sup>1</sup> Unearned  
 11 wages is [sic] different from unpaid minium [sic] wages or overtime compensation." *Lucas*,  
 12 at \*5. The context of this statement, however, was in regard to a dispute brought by drivers  
 13 of limousines, a category of employees expressly excluded from coverage pursuant to  
 14 §608.018. Further, the focus of the court's reasoning was whether this exclusion survived  
 15 an 2004 Amendment to the Nevada Constitution regarding minimum wages. Thus,  
 16 unearned wages are different from unpaid minimum wages, as not all employees are  
 17 entitled to be paid minimum wages. Having determined that the exclusion for limousine  
 18 drivers survived the Amendment, the court did not address and did not need to address  
 19 whether covered employees could maintain a private cause of action under §608.018.

20 Further, to the extent that the defendants cite language from the state trial court's  
 21 decision in *Csomos*, such language suggests either (a) that the decision conflicts with the

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22  
 23 <sup>1</sup> The defendant's misleading quote of this language at Page 13, line 2 of their  
 24 brief is not well taken, which fails to include context material to the meaning of the court's  
 25 statement, is not well taken. The court in *Lucas* did not hold that "unpaid wages . . . does  
 26 not extend to minimum wage and overtime claims." Rather, the court stated that "[t]he  
 private right of action for unpaid wages . . . does not extend to minimum wage and  
 overtime claims." The court's statement was directed to a private right of action. The court  
 gave no consideration or discussion whether an overtime claim or minimum wage  
 constituted unpaid wages.

1 Nevada Supreme Court's recognition, in footnote 3 of *Baldonado*, that employees can  
 2 maintain a private cause of action to recover wages and penalties pursuant to §608.140,<sup>2</sup>  
 3 or, if it does not so conflict, then (b) while an employee cannot bring a claim pursuant to  
 4 §608.018, employees can bring a claim pursuant to §608.140 to recover wages due and  
 5 owing pursuant to §608.018.

6 Regardless of whether, in their second claim for relief, the plaintiffs can directly  
 7 enforce §608.018, or whether they must instead enforce §608.140 for wages owing  
 8 pursuant to §608.018, the plaintiffs can proceed with their state law claim for unpaid  
 9 overtime wages. Accordingly, the Court will deny the defendant's motion to dismiss  
 10 plaintiffs' second and third claims for relief.

#### 11 Unjust Enrichment and Promissory Estoppel

12 The defendant's argument that the plaintiffs have failed to allege sufficient facts to  
 13 state claims for unjust enrichment and promissory estoppel borders on the frivolous. The  
 14 plaintiffs' allegation that Champion Drywall gave them paychecks that partially  
 15 compensated them for work performed and an IOU for the remainder (which IOU has not  
 16 been paid) sufficiently alleges that Champion Drywall did not pay them fully for the work the  
 17 employees performed. The defendant's suggestion that it is "entirely likely" that the  
 18 allegations regarding the IOUs represent an incentive payment that was not yet determined  
 19 is without any basis or merit. Accordingly, the Court will deny the defendant's motion to  
 20 dismiss plaintiffs' fourth and fifth claims for relief.

21 Accordingly, for good cause shown,

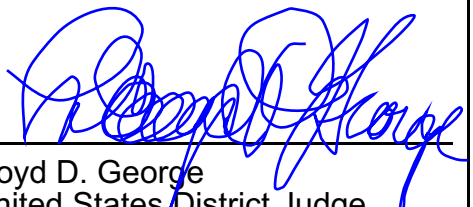
22 THE COURT **ORDERS** that Defendants' Motion to Dismiss (#32) is GRANTED in  
 23 part and DENIED in part as follows: Plaintiffs' First Claim for Relief is DISMISSED against

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24  
 25 <sup>2</sup> While the *Csomos* court purported to follow the reasoning of *Baldonado* to  
 26 conclude that was no indication from the legislative scheme of a private cause of action to  
 enforce §608.018, the Supreme Court in *Baldonado* itself, recognized, that the legislative  
 scheme expressly included a private cause of action to recoup unpaid wages.

1 the individual defendants—Paul DiGuseppi, Denise DiGuseppi, Ron Ruby, and Ed  
2 Golchuk—without prejudice; Defendants’ Motion is denied as to all other claims.

3  
4 DATED this 18 day of March, 2011.

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7 Lloyd D. George  
8 United States District Judge  
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